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No. _____

Supreme Court, U.S.
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In the

Supreme Court of the United States

October Term, 1991

TODD ANDREW MITHUN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Did the search of Petitioner Mithun's vehicle and the removal from and inspection of the case containing the suppressor by the government agent and two private individuals constitute an unreasonable governmental search prohibited by the Fourth Amendment to the United States Constitution?

II. Was the warrant obtained by the government agent to search Petitioner Mithun's vehicle tainted because information obtained from the agent's prior illegal search prompted the agent's decision to seek the warrant?

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TODD ANDREW MITHUN,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioner, Todd Andrew Mithun, petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

PARTIES TO THE PROCEEDING BELOW

United States of America

Todd Andrew Mithun

OPINIONS BELOW

The Decision of the United States Court of Appeals for the Eighth Circuit affirming Petitioner's conviction (Appendix p. A-1) was filed May 14, 1991.

The United Stated District Court's Order for Judgment including sentence under the Sentencing Reform Act finding Petitioner guilty (Appendix p. A-10) was entered August 6, 1990.

The Memorandum and Order of the United States District Court, District of Minnesota, Fourth Division, (Appendix p. A-17) denying Petitioner's Motion for Suppression of Evidence obtained as a result of search and seizure was filed May 24, 1990.

The Report and Recommendation of the United States Magistrate, United States District Court, District of Minnesota, Fourth Division (Appendix p. A-23) denying Petitioner's Motion for suppression of evidence obtained as a result of search and seizure was filed April 21, 1990.

JURISDICTION

The decision of the United States Court of Appeals for the Eighth Circuit affirming Petitioner's Conviction was filed May 14, 1991. The Order for Judgment by the United States District Court was entered August 5, 1990. Jurisdiction of this honorable court is invoked under 28 U.S.C. § (or section) 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment IV, United States Constitution:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .

STATEMENT OF THE CASE

Petitioner Todd Andrew Mithun was charged with being a felon in possession of a firearm in violation of Title 18, United States Code, Sections 922(g)(1) and 924(a)(1)(D), in an indictment filed on February 20, 1990. Pretrial motions were heard on March 20, 1990, in the United States District Court for the District of Minnesota, Fourth Division, the late Honorable Bernard P. Becker, United States Magistrate, presiding. Mithun was tried before a jury from June 4-6, 1990, in the United States District Court for the District of Minnesota, Fourth Division, the Honorable Edward J. Devitt presiding. The jury found Mithun guilty of the charged offense, and he was sentenced on August 6, 1990, to serve a sentence of imprisonment of 21 months (consecutive to a sentence to be served for a parole violation revocation) and to a three year period of supervised release following incarceration.

On December 7, 1989, Petitioner was arrested by Minneapolis Police officers at Glenwood and Lyndale Avenue North on traffic related charges. This arrest was the result of a request by Agent Hourihan of the Department of Alcohol, Tobacco and Firearms (ATF) to stop and identify the driver of the vehicle. The events leading up to Mithun's arrest, in short, are as follows.

On December 6, 1989, two valets at the Minneapolis Marriott Hotel opened and searched Mithun's locked vehicle, which had been parked in a ramp by the hotel's valet service. These two individuals, Jason Lehtinen and John Thompson, went into Mithun's vehicle because they felt Mithun had previously exhibited strange conduct in and around the hotel area, and the valets were curious as to what was in his vehicle. Among the items found by the valets was a case containing a small piece of metal with holes in the side which the valets believed at the time to be a silencer.

After searching Mithun's automobile and discovering the above-described article, the valets reported their find to their manager, Matt Kielas. Thereafter, Matt

Kielas and Anthony Jones, the hotel's Chief of Security, went to the vehicle and searched it, finding the article which they too believed at the time to be a silencer. Sometime thereafter, Agent Pat Hourihan of the ATF came to the hotel and met with Matt Kielas and Anthony Jones. Agent Hourihan identified himself to Kielas and Jones as a federal police officer. After some discussion, the three went to the garage to search and inspect Mithun's vehicle. It was clear to both Matt Kielas and Anthony Jones that they were returning to Mithun's vehicle to show Agent Hourihan what had been found inside the vehicle earlier in the day. Agent Hourihan did not instruct Kielas or Jones to open and search Mithun's vehicle, nor did he instruct them not to open and search the vehicle.

Upon reaching the vehicle, Matt Kielas unlocked and opened the rear hatch of the vehicle and removed the case containing what was believed to be a silencer. Kielas exclaimed something to the effect of "it's still here" and Agent Hourihan and Jones walked around to the back of the vehicle. Kielas then pulled the case out of the vehicle, opened the case, and handed the "silencer" to Agent Hourihan. Agent Hourihan then personally inspected the item in the case, handed it back to Kielas, told him to close the case up, put it back where he had found it, and lock up the vehicle. The case was returned to the vehicle, Agent Hourihan said, because he felt that any further search would require a search warrant. Thereafter, the three returned to the hotel.

Agent Hourihan did not attempt to procure a search warrant at that time. Rather, he chose to put Defendant Mithun under surveillance, to do further investigation into Mithun's background, and to notify other ATF officers. In addition, Agent Hourihan made arrangements with the Minneapolis Police to have Mithun's vehicle stopped if and when he left the hotel in his vehicle. On December 7, 1989, the day following the warrantless search of Mithun's vehicle by Kielas, Jones, and Agent Hourihan, Agent Hourihan directed officers of the Minneapolis Police Department to stop Mithun's car as he

left the hotel. At the request of Agent Hourihan, no inventory search was done at the site of arrest (in contravention of customary police procedure). Rather, after the arrest, Defendant Mithun's vehicle was towed by Police to and secured (at Hourihan's direction) at the Minneapolis City Impound and a federal search warrant was applied for and obtained by ATF agents.

The next day, on December 8, 1989, ATF agents executed a search warrant they had obtained from Magistrate Cudd (without revealing to Magistrate Cudd the earlier warrantless searches). They searched Mithun's vehicle and discovered, *inter alia,* a firearm and two loaded ammunition magazines inside the vehicle. A screw-on flash suppressor was also found inside a small white case in the rear cargo area of the vehicle.

REASONS FOR GRANTING THE WRIT

This Court should grant the writ sought by Petitioner Mithun because the United States Court of Appeals for the Eighth Circuit has applied the "instrument or agent" test in a manner which is inconsistent and in conflict with the application of that same test by other United States Courts of Appeal. Additionally, the United States Court of Appeals for the Eighth Circuit has decided a federal question in a way that conflicts with applicable decisions of this Court.

The search of Petitioner Mithun's vehicle by the government agent and two private individuals constituted an unreasonable governmental search prohibited by the Fourth Amendment because the hotel employees were acting as government instruments or agents at the time the search took place. The Eighth Circuit's decision to the contrary was erroneous and its application of the "instrument or agent" test is in conflict with at least three other decisions which have considered the "instrument or agent" test.

In *United States v. Walther*, 652 F.2d 788 (9th Cir. 1981), the Ninth Circuit recognized the well-established "instrument or agent" test and stated:

> This court has recognized that there exists a "gray area" between the extremes of overt governmental participation in a search and the complete absence of such participation. The resolution of cases falling within the "gray area" can best be resolved on a case-by-case basis with the consistent application of certain general principles. While a certain degree of governmental participation is necessary before a private citizen is transformed into an agent of the state, *de minimus* or incidental contacts between the citizen or law enforcement agents prior to or during the course of the search or seizure will not subject the search to Fourth Amendment scrutiny. The government must be involved either directly as a

> participant or indirectly as an encourager of the private citizen's actions before we deem the citizen to be an instrument of the state. The requisite degree of governmental participation involves some degree of knowledge and acquiescence in the search.

Id. at 791-792.

In *United States v. Feffer,* 831 F.2d 734 (7th Cir. 1987) the Seventh Circuit stated:

> The government may not do, through a private individual, that which it is otherwise forbidden to do. Accordingly, if in light of all the circumstances a private party conducting a search must be regarded as an instrument or agent of the government, the Fourth Amendment applies to that party's actions.

Id. at 737, *citing Coolidge v. New Hampshire,* 403 U.S 443 (1971).

In *United States v. Bennett,* 709 F.2d 803 (2nd Cir. 1983), the Court discussed the circumstances under which a presumably private search can be deemed a public search:

> Although the surreptitious search of premises by a private party does not violate the Fourth Amendment, if, in conducting the search, the searcher is acting as an instrument or an agent of the government, there is a Fourth Amendment transgression. However, "[a] private person cannot act unilaterally as an agent or instrument of the state; there must be some degree of governmental knowledge and acquiescence."

Id. at 805 (citations omitted).

In the instant case, the Eighth Circuit has rendered an erroneous decision regarding the "instrument or agent" test which is inconsistent with and in contravention to the guidelines and reasoning set forth in *Walther, Feffer* and *Bennett.*

The record in this case shows that under the "instrument or agent" test the search by the hotel employees with Agent Hourihan present and with his acquiescence and actual involvement renders the search a governmental

one to which the protections and prohibitions of the Fourth Amendment attach. Agent Hourihan went to the hotel to investigate suspicions which were reported by hotel employees. When he arrived he was shown a sketch of an object alleged to be in a hotel patron's car. He asked to be shown the car. He went to the car with two of the employees. When one of the employees opened the rear hatch of the door and exclaimed "it's still here," Agent Hourihan stepped to the back of the car and personally handled and inspected the item which was retrieved. Agent Hourihan never told the hotel employee to close the hatch. He never told him to put the item back. Rather, he chose to participate in the search, retrieval, and inspection of the item taken from Mithun's locked car.

The test in *Walther* states "[t]he requisite degree of governmental participation involves some degree of knowledge and acquiescence in the search." *Id.* at 792. Furthermore, the *Walther* court would require that Agent Hourihan be involved "either directly as a participant or indirectly as an encourager" of the private citizen's actions before the citizen could be deemed an agent of the state. Under the facts in this case, each ground of the *Walther* test is met, thereby necessitating a finding that the search of Mithun's car by Agent Hourihan and the hotel employees was a warrantless search under the Fourth Amendment.

As the court in *Feffer* cautioned, "[t]he government may not do, through a private individual, that which it is otherwise forbidden to do." That is exactly what was done here. The illegal conduct at issue should not be countenanced by this Court and a writ should be granted so that the erroneous decision of the Eighth Circuit can be corrected.

The decision by the Eighth Circuit also conflicts with and improperly applies this Court's decision in *United States v. Jacobsen,* 466 U.S. 109 (1984). *Jacobsen* essentially holds that the goverment may duplicate a previous private search so long as the governmental search does not exceed the scope of the private search. *Jacobsen*

is easily distinguishable on a number of grounds. First, the scope of the search in the instant case by Hourihan and the two hotel employees far exceeded the earlier private searches which occurred. The contents of the box in *Jacobsen* were, in the words of the Court, "freely made available for inspection." *Id.* at 119. In the instant case, nothing was "freely made available" for officer Hourihan's inspection. Agent Hourihan had to accompany the hotel employees to the distant parking garage, the car had to be unlocked, the tailgate had to be opened, the personal effects had to be moved aside, the case had to be removed from the car, the case had to be opened, and the item inside had to be removed. These activities constituted additional invasions of Mithun's privacy interests which were far greater, and of a distinctly different nature than the scope of the earlier private searches which occurred.

Another factor which distinguishes *Jacobsen* from the instant case is the importance the *Jacobsen* Court placed on the fact that the Federal Express package contained only one item of significance, namely, a suspicious looking "tape tube." The Court noted this fact no less than four times in its opinion:

> Those [private] invasions revealed the package contained only one significant item, a suspicious looking tape tube. (*Id.* at 115).
>
> When the first federal agent on the scene initially saw the package, he knew it contained nothing of significance except a tube containing plastic bags and, ultimately, white powder. (*Id.* at 118).
>
> Even if the white powder was not in "plain view" because it was still enclosed in so many containers and covered with papers, there was a virtual certainty that nothing else of significance was in the package and that a manual inspection of the tube and its contents would not tell him anything more than he already had been told. (*Id.* at 118).

The precise character of the white powder's

> visibility to the naked eye is far less significant than the facts that the container could no longer support any expectation of privacy, and that is was virtually certain that it contained nothing but contraband. (*Id.* at 120).

It is clear that the *Jacobsen* Court, in analyzing the case before it, placed great emphasis on the fact that the suspicious looking box contained, to a "virtual certainty," some sort of contraband. The facts in the present case are radically different. There was certainly nothing suspicious about Mithun's car, which was legally and securely parked in a public ramp. Moreover, the record makes clear that the luggage area of the car was packed with a plethora of items, none of which were overtly suspicious in nature. In addition, the case containing the suppressor was not even visible inside the car and, even when exposed, was not an unusual container which would raise suspicion.

A final and important distinction between *Jacobsen* and the instant case is the actual expectation of privacy manifested. In *Jacobsen,* an individual put a package, a cardboard box, into the stream of commerce, knowing that it would be touched by many hands and subjected to the harsh realities of the parcel post system. Here, Mithun parked his vehicle in a parking ramp, locking the doors. The suppressor case, a separate closed container in itself, was hidden from public view under his personal effects. The difference in the privacy interests between Mithun's car and the Federal Express package is clear.

In the final analysis, it is quite apparent that the facts in the instant case are far different from those in *Jacobsen.* The facts in this case present the Court with an opportunity to apply the general principle of *Jacobsen* to a different and more compelling privacy interest, namely, a person's private, locked automobile. The lower Courts' extension of *Jacobsen* to a citizen's private, locked automobile presents this Court with a chilling specter. If the line is not drawn regarding the application of *Jacobsen,* this Court in the

future will be faced with a case in which the government has sanctioned, pursuant to *Jacobsen,* a warrantless search of a private citizen's house on the ground that the governmental search was merely duplicating a private party's previous search. Thus, this Court should not extend the reaches of *Jacobsen* to the facts of this case, as to do so would set a chilling precedent and defile the fundamental protections guaranteed our citizens by the Fourth Amendment.

The reliance by the Magistrate, the District Court, and the Eight Circuit upon *Jacobsen* was misplaced, and the introduction at trial of evidence which emanated from the illegal warrantless search was error. This Court should grant a writ so the error below can be corrected.

A final reason for granting the writ is that the decision of the Eighth Circuit conflicts with this Court's decision in *Murray v. United States,* 487 U.S. 533 (1988).

Murray essentially instructs that where an agent's decision to seek a warrant is prompted by what the agent has discovered in an earlier illegal search, the resulting warrant is tainted.

In this case there is absolutely no evidence to show that prior to his illegal warrantless search Agent Hourihan planned to obtain any evidence through a warrant-authorized search. The record shows that the initial illegal search is what initiated the inquiries which led to the information which was used to obtain the warrant. *Murray* instructs that "what counts is whether the actual illegal search had *any* effect in producing the warrant." *Id.* at 542, n.3 (emphasis added). Here, the record makes clear that the illegal search is what prompted Agent Hourihan's decision to seek the warrant. Accordingly, the warrant which was obtained was tainted, and the evidence obtained in the search of Mithun's vehicle should have been suppressed.

For the reasons set forth above, a Writ of Certiorari should be granted in this case.

Respectfully submitted,
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APPENDIX

I. Decision of the United States Court of Appeals for the Eighth Circuit affirming Petitioner's conviction, filed May 14, 1991. ..... A-1

II. Judgment including sentence under the sentencing reform act finding Defendant guilty of the offense of Felon in Possession of a Handgun, dated August 6, 1990. ..... A-10

III. Memorandum and Order of the United States District Court denying Defendant's Motion for Suppression of Evidence obtained as a result of Search and Seizure, filed May 24, 1990. ..... A-17

IV. Report and Recommendation of the United States Magistrate denying Defendant's Motion for Suppression of evidence obtained as a result of Search and Seizure, dated April 21, 1990. ..... A-23

United States Court of Appeals
For the Eighth Circuit

No. 90-5430MN

United States of America, *Appellee,* v. Todd Andrew Mithun, *Appellant.*	**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA.**

SUBMITTED: FEBRUARY 15, 1991
FILED: MAY 14, 1991

Before McMILLIAN, ARNOLD, and LOKEN, Circuit Judges.

LOKEN, Circuit Judge.

Todd Andrew Mithun appeals from his conviction of being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(1)(D). Mithun argues that the firearm and other evidence seized after a warrant search of his car should have been suppressed at trial because the search warrant was based upon a prior warrantless search of the car that violated his Fourth Amendment rights. We affirm.

Mithun checked into a downtown Minneapolis hotel at 11:00 p.m. on December 5, 1989. Later that night, at Mithun's request, a hotel valet retrieved his car from the

hotel ramp. Mithun went to the car wearing a distinctive long black leather coat, opened the passenger door, and instructed the waiting valet not to watch. He then took something from the car, gave the keys back to the valet, told the valet he "did not see anything that happened here tonight," and left in a taxicab. The valet reparked Mithun's car in the hotel ramp and later saw Mithun return to his hotel room with two other people.

By the next morning, the valet had become concerned about Mithun's nervous and suspicious bahavior. Fearing for the safety of the hotel's valets and guests, he and another valet searched Mithun's car in the hotel ramp and discovered a white metal case containing what looked to them like a firearm silencer, a magazine of cartridges, and what appeared to be an ammunition box.

The two valets reported their discovery to the valet manager, who went to Mithun's car, looked in the back, and verified the apparent silencer's presence. The valet manager then reported to the hotel's chief of security, and the two of them went to Mithun's car and looked inside the white metal case. After each of these three searches, the hotel employees closed the white metal case after looking inside, replaced the case in the back of Mithun's car where they found it, and relocked the car.

The chief of security then called Minneapolis police, reporting that he had discovered what appeared to be a silencer and was concerned that the rest of the weapon might be on hotel property. Because a firearm was involved, Agent Patrick Hourihan of the federal Bureau of Alcohol, Firearms and Tobacco was contacted by Minneapolis police and responded to this call.

When he arrived at the hotel, Agent Hourihan met with the chief of security and was shown a sketch of the purported silencer. He then asked to look at the vehicle, and Hourihan, the chief of security, and the valet manager went to the hotel ramp where Mithun's car was still parked. While Hourihan was at the front of the car checking its license plates and registration number, the valet manager reopened the back of the car, retrieved and

opened the white metal case, and advised Hourihan that "it's still here." Hourihan inspected the object inside the case (which was in fact a firearm flash suppressor) and then instructed the hotel employees to put it back in the case, put the case back in the car, and relock the car. It is this warrantless search of his car by Agent Hourihan that Mithun contends violated his Fourth Amendment rights.

After leaving the hotel ramp, Agent Hourihan learned that the car was registered to Mithun, a convicteed felon then on federal parole, and that his driver's license had been revoked. Hourihan also talked with a suburban taxicab driver who had reported to police two weeks previously that Mithun had assembled and disassembled a "machine gun" in the driver's cab after a late night trip to North Minneapolis. Agent Hourihan then placed Mithun under surveillance at the Hotel.

The next morning, Mithun left the hotel in his car wearing the same black leather coat he had been seen wearing previously. After he left, a .380 caliber bullet was found in a hotel lobby area where he had been sitting. He was followed by Minneapolis police and federal agents. When Mithun made an illegal turn, Minneapolis police stopped his vehicle. In very cold weather, Mithun got out of his car without his coat. He was arrested for driving with a revoked licensed, and his car was towed to the Minneapolis impound lot. At Agent Hourihan's request, Minneapolis police did not conduct a normal inventory search of the car at the time of arrest.

After consulting with two Assistant U.S. Attorneys, Agent Hourihan then applied for a federal warrant to search Mithun's car. The application related what hotel employees had seen when they searched the car but omitted any reference to Hourihan's personal observation of the flash suppressor. The warrant was issued, and federal agents then searched Mithun's car at the impound lot. They seized an M-11 .380 caliber semi-automatic pistol, which was found in the right pocket of Mithun's black leather coat, two magazines loaded with .380 caliber

cartridges, a spent.380 caliber shell matching the bullet found in the hotel lobby, the white metal case with the flash suppressor inside, and an ammunition box.

Before trial, Mithun filed a motion to suppress all evidence seized from his car. Following an evidentiary hearing, the Magistrate Judge[1] recommended that the motion to suppress be denied. In a 49-page opinion, Magistrate Becker concluded that Agent Hourihan's initial viewing of the flash suppressor was not a "search" within the meaning of the Fourth Amendment because Hourihan's conduct did not exceed the scope of the three prior private searches by hotel employees; that Hourihan would have sought the warrant to search the car even if he had not personally viewed the flash suppressor, based upon all the other information he had properly obtained; and that Hourihan's search warrant application, which did not disclose his viewing of the flash suppressor, provided probable cause for the issuance of the warrant.

After Mithun filed objections to Magistrate Becker's Report and Recommendation, the district court[2] denied the motion to suppress, agreeing with Magistrate Becker that Agent Hourihan's initial search of Mithun's car simply duplicated the three prior private searches, and that, in any event, Hourihan had an independent basis to apply for the search warrant so that it was not tainted by his viewing of the flash suppressor. Thereafter, the firearm and other evidence seized during the warrant search were admitted at Mithun's trial, leading to his conviction and this appeal.

Like the district court, we conclude that the evidence in question was properly admitted for two independent reasons. First, the warrantless searches of Mithun's car in the hotel parking ramp did not violate his Fourth Amendment rights. As Mithun virtually concedes, the

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[1] The late Bernard P. Becker, United States Magistrate Judge for the District of Minnesota.

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[2] The Honorable Edward J. Devitt, Senior United States District Judge for the District of Minnesota.

first three searches by hotel employees were purely private searches. The hotel employees acted entirely on their own, without prior contact with any government official. The Fourth Amendment's protection against unreasonable searches and seizures "is wholly inapplicable 'to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official.'" *United States v. Jacobsen,* 466 U.S. 109, 113 (1984), quoting *Walter v. United States,* 447 U.S. 649, 662 (1980) (Blackmun, J., dissenting). Thus, Mithun has no Fourth Amendment claim based upon the conduct of the hotel employees before Agent Hourihan arrived.

Mithun's argument focuses, as it must, on the fourth search of his car in the hotel ramp by Agent Hourihan. Mithun contends that this search did violate his Fourth Amendment rights because the hotel's valet manager acted as the "instrument or agent" of Agent Hourihan in returning to the car, unlocking it, removing and opening the white metal case, and showing the flash suppressor to Hourihan with the latter's "acquiescence and actual involvement." We disagree.

In *Jacobsen,* the Supreme Court held that a federal agent did not violate the Fourth Amendment when he examined a package that had been opened by Federal Express employees, who then left it unsealed and invited the agent to their offices for the purpose of viewing it. 466 U.S. at 115-120. In *United States v. Boyer,* 914 F.2d 144 (8th Cir. 1990), *cert. denied,* 111 S. Ct. 1110 (1991), this court held that the agent did not violated the Fourth Amendment by searching a package that had been privately searched and then resealed before being turned over to the government. We concluded that the holding in *Jacobsen* "does not turn on whether the private party hands the package over to the government in a sealed or unsealed condition," so long as the government's subsequent warrantless search does not "exceed the scope of the [prior] private search." *Id.* at 146.

Boyer is controlling in this case. As the district court

found, Agent Hourihan's inspection of the flash suppressor in the parking ramp went no further, indeed was less intrusive, than the three prior private searches by the hotel employees. The fact that the valet manager has to unlock Mithun's car to permit Hourihan to duplicate the prior private searches is not more significant than the fact that the government opened the resealed package in *Boyer*. Under *Jacobsen*, Mithun's limited expectation of privacy with respect to the white metal case had already been extinguished by the private searches.[3] As in *Boyer*, the property that had been the subject of the private search was still in the possession of the private party who made that search. Under these circumstances, the fact that the valet manager assisted Hourihan in duplicating the prior private searches did not revive a Fourth Amendment privacy interest that had previously expired.

The cases upon which Mithun relies, *United States v. Walther*, 652 F.2d (9th Cir. 1981), and *United States v. Feffer*, 831 F.2d 734 (7th Cir. 1987), are distinguishable. Each involved the question whether the party who conducted the private search did so as an agent of the government, either because the private party hoped to be paid for the information supplied (*Walther*), or because government agents allegedly encouraged the private party to obtain documents wrongfully (*Feffer*). Here, on the other hand, there is no question that the private searches were conducted with no government knowledge or participation. The only question is Agent Hourihan's

[3] We question (but do not decide) whether Mithun had a legitimate expectation of privacy with respect to firearm accessories some of which were left in relatively plain view in a vehicle that he turned over to hotel valets for parking. *See Illinois v. Andreas*, 463 U.S. 765, 771 (1983). Certainly the valets' concern for the safety of themselves and other hotel guests was reasonable, as was the conduct of the chief of hotel security in reporting the possible possession of firearms on hotel property to the Minneapolis police. Under these circumstances, Mithun assumed the risk that hotel employees would discover the contraband and reveal that information to the authorities, in which ase "the Fourth Amendment does not prohibit governmental use of the now nonprivate information," *Jacobsen*, 466 U.S. at 117.

subsequent search, and that question, under *Jacobsen*, turns solely on whether Hourihan went no further than the prior private searches. We agree with the district court that he did not.

Second, we agree with the district court that, even if Agent Hourihan's warrantless inspection of the flash suppressor were illegal, the evidence seized when the car was searched the next day pursuant to a search warrant was not "tainted" by Hourihan's earlier search.

It is undisputed that the Minneapolis police properly arrested Mithun and impounded his car, that Agent Hourihan then prepared a search warrant application that did not rely upon his prior viewing of the flash suppressor, and that the Magistrate Judge had probable cause to issue the warrant. Mithun argues that the search warrant was nonetheless tainted because Agent Hourihan's decision to seek it was necessarily prompted by his prior search and therefore, under *Murray v. United States*, 487 U.S. 533 (1988), the search warrant was not the product of "independent sources."

Magistrate Becker thoroughly considered this argument and rejected it, explaining:

> Based upon all of the information that Agent Hourihan had gathered from the moment he entered the Marriott City Center and security chief Tony Jones' office on December 6, 1989, through December 7, 1989, when Hourihan and two Assistant United States Attorneys drafted the application for the search warrant, it is reasonable to assume that Agent Pat Hourihan, a veteran law enforcement officer, would have sought a warrant to search defendant Mithun's car notwithstanding his viewing of the flash [sup]pressor contained in the white metal case.

The district court agreed:

> The Magistrate correctly concludes that there was an independent basis on which to apply for the search warrant. *See Segura v. United States*, 468 U.S. 796 . . .
>
> The three private searches at the Marriott garage

clearly provided an independent basis for the warrant search. The fourth entry by agent Hourihan simply duplicated the efforts of the three previous private searches.

In *Murray,* where a search warrant was obtained after an illegal entry, the Supreme Court held that the evidence seized during the warrant search was admissible if the search warrant was the product of independent sources of information, rather than information obtained during the illegal entry. That question turned on whether "the agents' decision to seek the warrant was prompted by what they had seen during the [illegal] entry, or [whether] information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant." *Id.,* 487 U.S. at 542. The case was remanded to the district court for determination of those independent source issues.

In this case, the district court has made detailed findings and the express determination, missing in *Murray,* that "the warrant-authorized search . . . was an independent source of the challenged evidence," *Id.* at 543-544. With respect to the first independent source issue identified in *Murray*, after careful review of the record, we agree with the district court's determination that Agent Hourihan's decision to seek the warrant was not prompted by his viewing of the flash suppressor, but rather by what the hotel employees told him and the other information uncovered in his investigation of Mithun. With respect to the second independent source issue, it is undisputed that the information obtained by Agent Hourihan during his warrantless search was not presented to the Magistrate and thus did not affect his decision to issue the warrant. Under these circumstances, the warrant was the product of independent sources, and the evidence seized was admissible at Mithun's trial.

Accordingly, we affirm.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

United States District Court

District of **MINNESOTA**

UNITED STATES OF AMERICA

v.

TODD ANDREW MITHUN

(Name of Defendant)

JUDGMENT INCLUDING SENTENCE UNDER THE SENTENCING REFORM ACT

Case Number CR. 4-90-26

ANDREW BIRRELL
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to counts(s) _____.

☒ was found guilty on count(s) I after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count Number(s)
18 USC 922(g)(1) 18 USC 924(a)(1)(D)	Felon in possession of firearm	I

The defendant is sentenced as provided in pages 2 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)_____, and is discharged as to such count(s).

☐ Count(s) _____ (is)(are) dismissed on the motion of the United States.

☐ The mandatory special assessment is included in the portion of this Judgment that imposes a fine.

☐ It is ordered that the defendant shall pay to the United States a

special assessment of $ 50.00 , which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number:

336-52-5205

August 6, 1990
Date of Imposition of Sentence

Defendant's mailing address:

901 County Road 73

Signature of Judicial Officer

Minnetonka, MN 55441

EDWARD J. DEVITT, JUDGE
Name & Title of Judicial Officer

Defendant's residence address:

August 6, 1990
Date

Defendant: TODD ANDREW MITHUN
Case Number: Cr. 4-90-26

Judgement-Page 2 of 4

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of TWENTY-ONE (21) months to be served consecutive to the Parole Revocation Sentence.

☐ The Court makes the following recommendations to the Bureau of Prisons:

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district,

☐ at _____ a.m. p.m. on _____ .

☐ as notified by the Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgement.

CERTIFIED ORIGINAL AND COPIES IN FOUR PAGES

Dated: August 6, 1990

_____
United States Marshal

BY: _____
Deputy Clerk

By _____
Deputy Marshal

Defendant: TODD ANDREW MITHUN
Case Number: Cr. 4-90-26

Judgement-Page 3 of 4

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of three (3) years.

While on supervised release, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

☐ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

15) Possess no firearm or dangerous weapons.

/ 16) Submit to drug testing at least every SIXTY (60) days and participate in a substance abuse program at the direction of P.O.

17) Participate in program of Mental Health Treatment at the direction of P.O.

Defendant: TODD ANDREW MITHUN
Case Number: Cr. 4-90-26

Judgement-Page 4 of 4

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgment:

1) The defendant shall not commit another Federal, state or local crime;

2) the defendant shall not leave the judicial district without the permission of the court or probation officer;

3) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

5) the defendant shall support his or her dependents and meet other family responsibilities;

6) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

7) the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;

8) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

9) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

11) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

12) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

13) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

14) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

These conditions are in addition to any other conditions imposed by this Judgment.

United States District Court
District of Minnesota
Third Division

UNITED STATES OF AMERICA, *Plaintiff,* v. TODD ANDREW MITHUN, *Defendant.*	**MEMORANDUM AND ORDER** Crim 4-90-26(1)

DOUGLAS R. PETERSON, Assistant United States Attorney, District of Minnesota, for the United States.

ANDREW S. BIRRELL, Meshbesher, Birrell & Dunlap, Ltd., Minneapolis, Minnesota, for the defendant.

INTRODUCTION

An indictment was filed on February 20, 1990, against defendant Todd Andrew Mithun, charging him with knowingly possessing a firearm in violation of 18 U.S.C. §§ 922 (g) (1) and 924 (a) (1) (D). On March 20, 1990, Magistrate Becker held a hearing on defendant's pretrial motions, and made the following Report and Recommendation: (1) that defendant's motion to compel the government attorney to disclose evidence favorable to the defendant is denied as moot; (2) that defendant's motion for participation in voir dire is deferred; and (3) that defendant's motion to suppress evidence obtained by search and seizure is denied. Defendant objects to the Magistrate's Report and Recommendation with regard to the suppression issue. For the reasons stated below, defendant's motion for suppression of

evidence obtained as a result of search and seizure is denied.

BACKGROUND

On December 6, 1989, defendant, who was staying at the Marriott Hotel in downtown Minneapolis, asked a Marriott valet, Jason Lehtinen, to park his Celebrity station wagon in the Marriott garage. While searching for something under his seat, defendant ordered Lehtinen to turn around and told the valet that he (Lehtinen) "did not see anything that happened here tonight." Lehtinen proceeded to park and lock defendant's car in the Marriott garage.

Based on this suspicious behavior, Lehtinen and a fellow valet, John Thompson, returned to the parked station wagon to discover if there was anything in the car that could endanger anyone. Thompson opened the back hatch of the station wagon and found a white carrying case containing a long piece of metal with holes in the side, which the two believed to be a silencer. The case was partially located under a duffel bag. Later that day, a valet by the name of Matt Kielas returned to and entered the parked station wagon. He also found the white carrying case. Kielas then reported his find to Tony Jones, chief of hotel security, and the two men returned to the locked station wagon for a third visit and examined the white carrying case.

A fourth visit to the locked station wagon involved Jones, Kielas and a government agent named Patrick Hourihan. As Jones and the agent examined the car's front license plate, Kielas opened the back hatch of the station wagon and produced the white carrying case. The agent briefly handled the white carrying case before requesting the valets to close and return the case to the car. The car was locked and the three men proceeded back to the hotel.

The next day, December 7, 1989, the police trailed defendant's station wagon from the Marriott and

stopped the car at the intersection of Glenwood and Lyndale Avenues. The purpose of the stop was to identify the driver of the station wagon and insure that the man was the defendant. A computer check indicted that the defendant had a prior felony conviction and that his driver's license had been revoked. The officers arrested defendant for driving while revoked and towed his vehicle to the Minneapolis Police Department Impound Lot.

Thereafter, agent Hourihan applied for a federal warrant to search the vehicle. The agent excluded the fourth vehicle entry from his affidavit. During the search, agent Hourihan found the white carrying case in the back cargo compartment of the station wagon and noted that is was partially hidden from view by some duffel bags. The item found inside the case was not a silencer, but a "suppressor quality barrel extension." On the car's console the agent found a weapon located in the right pocket of a black leather coat the defendant had been wearing when he left the hotel. In addition, the agent found one magazine partially protruding from underneath the front passenger seat, and a second magazine in the center console. Both magazines were loaded.

DISCUSSION

Defendant asserts that the warrantless searches of his car at the Marriott garage undertaken by three private individuals and a government agent violated his fourth amendment right against unreasonable search and seizures. Defendant further contends that all fruits of that illegal search must be suppressed.

The fourth amendment protects against unreasonable searches and seizures. *United States v. Espinosa,* 782 F.2d 888, 890 (10th Cir. 1986). Searches conducted without a warrant or probable cause are presumed unreasonable, subject to only a few recognized exceptions. *United States v. Gay,* 774 F.2d 368, 376

(10th Cir. 1985). Fourth amendment protections, however, only apply to governmental action. A search and seizure, even if unreasonable, preformed by a private individual not acting as a government agent or in concert with a governmental official, is not within the scope of the fourth amendment. *United States v. Jacobsen,* 466 U.S. 109, 113, 104 S.Ct. 1652, 1656, 80 L.Ed.2d 85 (1984). The first three entries into, and subsequent searches of, defendant's car at the Marriott garage were clearly private searches by hotel and valet service employees.

The fourth search, by Marriott employees accompanied by a government agent, is more seriously contended by the defendant. The Supreme Court, in *United States v. Jacobsen, supra,* provides the appropriate analysis of a governmental search which follows on the heels of a private search. In *Jacobsen,* Federal Express employees opened a damaged package and found several plastic bags of white powder later indentified as cocaine. The carrier notified the Drug Enforcement Administration (DEA). The responding DEA agent handled the damaged package, removed the plastic bags and observed the white powder.

A majority of the Court determined that no unreasonable search or seizure had occurred. The Court tested the legality of the government's search by the "scope of the antecedent private search." *Id.* at 116, 104 S.Ct. at 1658. The Court was certain that the subsequent government search would not reveal anything more than the agent had already been told by the carrier. *Id.* at 119, 104 S.Ct. at 1659--60. Any privacy interest in the package had been eliminated after the package was unsealed and inspected by the carrier's employees who then invited the government to do likewise. *See also United States v. Walsh,* 791 F.2d 811, 811--12 (10th Cir. 1986) (warrantless search and seizure of an unclaimed brief case and its contents by federal agent after airline employees' private search did not violate the fourth amendment, particularly

where the scope of the agent's search did not exceed the scope of the private search.)

Likewise, the three antecedent private searches by Marriott employees in this case revealed the contents of the white carrying case. Only at the express invitation of the Marriott employees did agent Hourihan inspect defendant's automobile. The flash suppressor was in plain view after the Marriott employees opened the station wagon and white metal case, and could no longer support a reasonable expectation of privacy. There is no evidence that agent Hourihan's search exceeded the scope of this private search. If anything, the government's search was less intrusive than the previous private search. Although the federal agent was in the vicinity of the automobile, a valet acted on his own to reenter the car and display a white carrying case with a flash suppressor to the agent.

In defendant's memorandum objecting to the Magistrate's Report and Recommendation, defendant argues that this case is distinguishable from *Jacobsen* and *Walsh.* Defendant contends that in *Jacobsen* and *Walsh* the named defendant's privacy interest was violated and never restored. In contrast, defendant argues thast the Marriott employees in this case restored defendant's privacy interests when they locked the defendant's automobile and left it in the parking garage after conducting their first three searches.

It is of no significance, however, that the station wagon was locked and left in the parking garage when the government agent arrived, and then unlocked for him by one of the Marriott employees. As the *Walsh* court explained, "whether a government agent reopens that which has been searched privately does not convert 'an otherwise private search into an unreasonable official search.'" *Walsh,* 791 F.2d at 816 n.5 (*quoting United States v. Blanton,* 479 F.2d 327, 328 (5th Cir. 1973)).

The defendant next challenges the search warrant

in an attempt to suppress the fruits of the later search of defendant's automobile at the Minneapolis impound lot. The admissibility of the evidence discovered by agent Hourihan during the warrant search, however, does not hinge on the court's ruling regarding the allegedly tainted fourth entry of the car at the Marriott garage. The Magistrate correctly concludes that there was an independent basis on which to apply for the search warrant. *See Segura v. United States,* 468 U.S. 796, 104 S.Ct. 3380, 82 L.Ed.2d 599. The three private searches at the Marriott garage clearly provided an independent basis for the warrant search. The fourth entry by agent Hourihan simply duplicated the efforts of the three previous private searches.

CONCLUSION

Based upon the Report and Recommendation of the Magistrate, and a de novo review of all the files, records and proceedings herein,

IT IS ORDERED that defendant's motion for suppression of evidence obtained as a result of search and seizure is DENIED.

Date: May 24, 1990

EDWARD J. DEVITT
United States District Court

United States District Court
District of Minnesota
Fourth Division

United States of America,
Plaintiff,

v.

Todd Andrew Mithun,
Defendant.

Criminal No. 4-90-26(1)

REPORT & RECOMMENDATION

DOUGLAS R. PETERSON, Esq., Assistant United States Attorney, appeared on behalf of plaintiff.

ANDREW S. BIRRELL, Esq., appeared on behalf of defendant.

BERNARD P. BECKER, United States Magistrate

This matter came on for hearing on March 20, 1990, before the undersigned United States Magistrate on pre-trial motions of the defendant. The defendant was present and represented by counsel. This matter is set for trial before Judge Diana E. Murphy, United States District Court for the District of Minnesota. The undersigned has jurisdiction to issue a Report and Recommendation pursuant to 28 U.S.C. §636 and Local Rule 16.

I. FACTS

An indictment was filed on February 20, 1990, against defendant Todd Andrew Mithun. The indictment charges that on or about the 7th day of September, 1989, in the State and District of Minnesota, the defendant Todd Andrew Mithun, having previously been convicted in

United States District Court for the District of Minnesota for the crime of distribution of cocaine, a felony punishable by imprisonment for a term exceeding one year, did thereafter knowingly possess a firearm, to wit: an RPB Industries, Inc. M-11, .380 caliber semi-automatic pistol bearing serial number 380685; all in violation of Title 18, United States Code, §§922(g)(1) and 924(a)(1)(D).

At the pre-trial motions hearing on March 20, 1990, the government presented Jason Lehtinen, Matt Kielas, Anthony (Tony) Jones and Agent Patrick Hourihan, Bureau of Alcohol, Tobacco and Firearms (ATF), who testified in regard to the events of December 6, and 7, 1989.

II. DISCUSSION

A. Motion to Compel Government Attorney to Disclose Evidence Favorable to the Defendant

Defendant moved pursuant to the authority of *Brady v. Maryland,* 373 U.S. 893 (1963); *Miller v. Pate,* 386 U.S. 1 (1967); *Giles v. Maryland,* 386 U.S. 66 (1967); and *Moore v. Illinois,* 408 U.S. 786 (1972), for disclosure of any evidence in the possession of, or within the knowledge of, the prosecution or any of its agents, which may be favorable to the defendant or could reasonably weaken or affect any evidence introduced against the defendant, or is otherwise relevant to the subject matter of this case and may in any manner aid the defendant in investigation or preparation.

The government responded that it understands its *Brady* obligations and has complied with those and will continue to comply prior to trial. Thus, to the extent that the government has complied and will continue to comply with the requirements of *Brady* and its progeny, defendant's motion should be dismissed as moot.

B. Motion for Participation in Voir Dire

Defendant moved pursuant to Rule 24(a), Fed.R.Crim.P., for an order permitting defendant's counsel to question the jury panel during voir dire. The government opposed

this motion and asked that the Court stand behind Judge Murhpy's practice on this issue which is to not allow attorneys to conduct voir dire.

Since the jury selection has been determined to be outside the competence of an Article I Judge, *Gomez v. United States,* 490 U.S. ____ (1989) (Nos. 88-5014 and 88-5158), the matter of jury voir should be left to the determination of the Article III trial judge. This motion is therefore deferred.

C. Motion to Suppress Evidence Obtained by Search and Seizure

Defendant moved the Court for an order suppressing any and all evidence obtained as a result of search and seizure on the grounds that the search and seizure violated defendant's constitutional rights.

In response to this motion, the government produced four witnesses who testified about the events which occurred on December 6, and 7, 1989. The government first called Jason Lehtinen, a 19-year-old high school graduate who was employed by the Mile High Valet Company in December, 1989. Lehtinen worked as a valet for Mile High Valet Company in connection with its contract with the Marriott City Center Hotel, Minneapolis, Minnesota. Lehtinen testified that his duties included parking hotel guests' cars in the parking ramp or nearby garage; retrieving the cars for their owners; insuring that the guests' cars were securely locked and if there was something of value in the car, removing it from plain view to protect the item from theft; insuring that the cars were safe, *i.e.,* that nothing dangerous was inside or outside the car, including checking for flat or low tires; performing some computerized billing tasks; cleaning the office; and generally seeing that things to run smoothly. In early December, 1989, Lehtinen worked two days a week from 3:00 p.m. to 11:00 p.m. and two days a week from 11:00 p.m. to 7:00 a.m. He testified that keys for the customers' cars are initially received directly from the customer, the car is parked in either the ramp directly across from the Marriott

City Center or in the garage on Seventh Street between Hennepin and First Avenues, and the keys are then placed on a numbered board on the wall of the valet office.

On Tuesday, December 5, 1989, Mr. Lehtinen was on duty from 11:00 p.m. to 7:00 a.m. Between 2:30 to 3:00 a.m., Wednesday, December 6, 1989, he received a phone call from the owner of a 1986 Celebrity station wagon requesting that Lehtinen bring the car around to the front of the hotel. This was not the first time Lehtinen had had contact with the owner of this particular car, as the man had previously been a guest at the hotel. Lehtinen retrieved the Celebrity station wagon from the garage and moved it to the street in front of the hotel where he locked the doors and returned indoors to the valet desk. Nearly one-half hour later, the owner of the Celebrity station wagon telephoned the valet desk to determine if his car was waiting on the street, learned that its was and went directly out to the car. Lehtinen brought him the car keys and noted that the man was wearing a long black leather coat and a black leather hat. The owner of the car opened the passenger side door, and with Lehtinen standing approximately five feet from the door waiting for a tip, began searching for something underneath the seat. The man looked up at Lehtinen and told him to turn around and not watch, and Lehtinen complied. He then ordered Lehtinen to hale him a taxicab which Lehtinen did. Upon arriving back at the Celebrity station wagon, Lehtinen noticed the car's owner put something in his jacket. The man then closed the door of the station wagon, gave the keys back to Lehtinen and entered the taxicab. As he was entering the cab, the station wagon's owner told Lehtinen that Lehtinen "did not see anything that happened here tonight," and that he would "flip (Lehtinen) a ten later." The taxicab left and Lehtinen re-parked the Celebrity station wagon. The witness identified Government Exhibit 2 as a photo of the Celebrity station wagon. The exhibit was offered and received into evidence.

Some time later, the owner of the Celebrity station wagon returned to the hotel accompanied by two other

people in a 1980 blue Mercury Cougar. The station wagon's owner told Lehtinen that he wanted the Cougar either parked or left on the street, so Lehtinen went out to the car, turned the headlights off and closed up the car. The group of people proceeded up to their room.

Although Jason Lehtinen was scheduled to be off duty at 7:00 a.m. on December 6, 1989, one relief valet did not show up and Lehtinen volunteered to work a double shift. Because Lehtinen was worried about his personal safety after his experience with the owner of the Celebrity station wagon, whom he identified as defendant Todd Mithun, Lehtinen told his manager Matt Kielas about his encounter with defendant Mithun earlier that morning. In Lehtinen's words he told Kielas that Mithun was "real jumpy and real nervous and stuff and everything that had gone on, how suspicious he looked." With those things on his mind, somewhere between noon and 3;00 p.m. that afternoon, Lehtinen and a fellow valet, John Thompson went back to the Celebrity station wagon parked in the garage out of curiosity and in an effort to discover if there was anything in the car that would endanger anyone else. Lehtinen looked primarily in the back seat area and found a white, soft, cylindrical package about eight inches long and three or four inches in diameter as well as a small bottle of flammable fluid he believed to be kerosene. John Thompson opened the hatch at the back of the car and was looking in the back portion of the station wagon where he found a case containing a long piece of metal with holes in the side, which the two believed to be a silencer. Counsel for the government presented Lehtinen with a photograph marked Government Exhibit 3, and Lehtinen affirmed that the photo looked like the item the two men found in defendant Mithun's car on the afternoon of December 6, 1989.

Lehtinen and Thompson promptly reported their finds to their manager Matt Kielas. Lehtinen also recalls speaking to two people at about 4:00 p.m. that same afternoon, but adamantly insisted that no one had ever instructed hime to go search the Celebrity station wagon,

and in fact, he had no idea that police were involved until late that afternoon.

On cross-examination, Lehtinen testified that although he no longer works regularly for Mile High Valet Company, he does work on an "on call' basis. Lehtinen stated that when he began his job in August, 1989, he was trained by a veteran valet name Eric Bertsch. Lehtinen also testified that he had seen defendant Mithun several times prior to December 5 and 6, 1989, because Mithun had previously been a guest at the hotel. Lehtinen expressed his opinion that his previous interactions with defendant Mithun led him to believe that Mithun is a suspicious character because Mithun was always "jumpy." Lehtinen stated that it was John Thompson's idea to search defendant Mithun's car and that he chose to go along with Thomspon. The men were not searching for anything specific, but they thought perhaps they would find drugs or a gun. Lehtinen stated that he conducted the search of Mithun's car because he felt that if he could find information that Mithun was dangerous or if there was something going on that was dangerous to himself and other valets and to guests of the hotel that he would be performing his job more effectively. Lehtinen assumed that any information he uncovered as a result of the search would be dealt with by the hotel's own security force and possibly by the police. Due to the fact there had been other things happening in the early morning hours at the hotel and considering the neighborhood, Lehtinen was concerned about safety. Lehtinen testified that the thought of a reward was not the motivating factor in conducting the search of defendant's car. He was aware that perhaps two other searches of defendant's car were conducted by hotel employees following his own and Mr. Thompson's search, and believes that the searches took place within an hour following the original search, but was not present during the subsequent searches.

The government's second witness was Matt Kielas, who is employed by Mile High Valet Company to manage the valet parking for the Marriott City Center Hotel. Kielas

has worked for Mile High Valet for approximately three years, is 23 years old and a high school graduate. Mr. Kielas' main duties are the scheduling of his employee valets, ensuring that everything runs smoothly and that the guests are satisfied with the valet service. Kielas testified that although the valets are not liable for the contents of the cars they park, they do have certain responsibilities for the safety of the cars and their contents. For example, if there is something valuable inside the car, the valets make an effort to tuck it away out of sight, thus preventing theft if at all possible. Kielas also stated that the valets lock the doors of the cars at all times, even in their security garage.

Kielas was on duty on Wednesday, December 6, 1989, and remembers Jason Lehtinen mentioning something about a certain gentlemen who had, on the previous night, "drawn attention to himself." Also, Kielas recalls that at about 1:00 p.m. on December 6, 1989, John Thompson relayed some information about a Celebrity station wagon parked in the security garage. After hearing that Thompson had found a gun case containing a possible silencer, Kielas went to the car to look for himself out of curiosity and concern for his employees as well as guests of the hotel. The Celebrity station wagon was parked in stall No. 59 in the security garage. Kielas was alone when he entered the Celebrity station wagon and testified that it was his decision to do so and he had not talked to a police officer about the entry. Kielas stated that the interior of the station wagon was a mess, but that he did located a white metal case containing what Kielas believed to be a silencer. Kielas closed the case, locked the car and returned to the hotel where he contacted Tony Jones, chief of hotel security. Kielas escorted Jones back to the Celebrity station wagon, believing that Jones would be better equipped to indentify the item in the case. Kielas only recalls showing Jones the case in the Celebrity station wagon.

Upon returning to the hotel, Tony Jones contacted the police. Kielas returned for a third time to the Celebrity

station wagon in the security garage accompanied by Tony Jones and a federal agent. Kielas stated that this was a dirty gray station wagon located in a garage with few windows so that the lighting was not bright but there was enough light to see clearly. Kielas testified that the three men were looking at the car and that he proceeded to the back of the car and opened the hatch. Kielas stated that the agent did not instruct him to open the hatch, rather, Kielas made that decision on his own, and remembers that at that point the agent and Tony Jones were at the front of the car looking at the license plate or the inside of the windshield. Kielas testified that when the other two joined him at the back of the car, the hatch was already open and he was reaching for the white case which he proceeded to open. Kielas picked up the case and said "here's what we found." He testified that the federal agent did not instruct him to open the case, nor did either the agent or Tony Jones look into the car at all. Kielas returned the case to the car, locked the car and the three men proceeded back to the hotel.

On cross-examination Mr. Kielas identified Patrick Hourihan as the agent who had accompanied him and Jones to the garage. It was established that Kielas received a phone call from Tony Jones requesting him to come outside the hotel and accompany Jones and Agent Hourihan to the garage. Kielas met Jones and Agent Hourihan on Seventh Street outside of the employee entrance to the hotel, and the three men accomplished the one-minute walk to the garage, but Kielas cannot recall whether or not a conversation took place. Kielas estimates that the three men remained in the garage for approximately four to five minutes. Kielas recalled that as he stood at the back of the car opening the hatch, he observed Agent Hourihan writing something down on a pad of paper, and assumed that Hourihan was recording the license plate number. Kielas stated that he had neither told Jones and Agent Hourihan that he had the keys for the car nor had they asked whether he had the keys for the car, but he was carrying the keys to the gray Celebrity

station wagon when the three men proceeded to the garage that day.

Kielas clarified that he had already opened the back hatch of the car and had retrieved the case prior to Jones and Hourihan arriving at the back of the car. When the two men arrived, Kielas was about to open the case. Kielas did open the case with no instructions from anybody, took out the item he believed to be a silencer and said "this is what we found", handed it to Agent Hourihan who examined it and placed it back in the case. Kielas then closed the case, put it back where he had found it and closed the hatch. He stated that the case was partially resting under a duffel bag or some other item, and believed that perhaps a person would be able to see a part of the case from the window of the car.

According to Kielas, Agent Hourihan said that the time appeared to be a flash suppressor which muffles the actual fire or flame of the gun shot. Kielas again emphasized that he was not acting under the instructions of Agent Hourihan at any time, and emphasized that the only conversation he recalls between himself, Tony Jones and Agent Hourihan had to do with what had been found in defendent Mithun's car, and not whether Agent Hourihan intended to search the car or simply look in the windows. Kielas was not informed about what would happen once the three arrived at the car.

The government's third witness was Anthony Jones, supervisor of security at the Marriott City Center Hotel since 1988. His job entails insuring the safety, security and well being of the hotel guests and employees. Jones was on duty on December 6, 1989, and was scheduled to go off duty at 3:00 p.m. that day. However, near the end of his shift, Jones received reports concerning a guest named Todd Mithun. Jones heard from the concierge that when Todd Mithun checked into the hotel Mithun grabbed the concierge by the collar and told him that he (Mithun) was not being checked in fast enough; the front desk manager reported that Mithun was acting suspiciously and yelling in the lobby area; and lastly Matt Kielas relayed to Jones

that the valets had found what they believed to be a silencer in Mithun's car.

Out of concern that there was possibly a weapon in the hotel that could jeopardize the well being of the hotel guests and employees, Jones requested that Kielas show him the gun case with the so-called silencer inside. Jones and Kielas made the trip to the parking garage where Jones viewed the case with the silencer inside. Jones testified that at that point he had not contacted any police officers. However, Jones did call that Minneapolis Police Department upon returning to the hotel after viewing the items, informing the police that he believed there was a silencer contained in the case and that the rest of the gun might be on hotel property.

ATF Agent Hourihan responded to Jones' call. Jones recalls that Matt Kielas accompanied Agent Hourihan and himself to the garage. Jones and Agent Hourihan were looking at the registration at the front of the car while Kielas went directly to the rear of the car, opened the hatch and brought out the case. Jones testified that no one had instructed Kielas to open the car, but Jones stated he had asked Kielas to look at the case once more because Jones wanted to show the officer what had been found. Kielas had already opened the car before Jones was even aware of it and stated "this is it", opening up the box and displaying the contents. Jones recalls that at this point he alone was at the back of the car with Kielas and that Agent Hourihan was still at the front of the car. Hourihan did come around the car from the front, he did not search any areas of the car, and Kielas placed the case back where it came from in the rear portion of the vehicle.

Upon returning to the hotel, Jones testified that he procured rooms for the agents so that they could assist the hotel security in protection in the event that any trouble arose.

On cross-examination Jones agreed that the purpose of the going back to the car was to look at the things that the valets had found, and agreed with defense counsel that all three men understood this to be the purpose.

Jones testified that from 1974 through 1976, he was with the St. Louis, Missouri City Police Department, and from 1977 through 1986, he was a railroad police officer with the Illinois Central special agents. Jones is not longer a licensed police officer and does not carry a gun. His duties as head of security at the Marriott City Center include acting as a liaison with the various police forces around the city. However, Jones testified that encounters with police officers from the different bureaus occur only from time to time, and that he had not previously met Agent Hourihan. Jones states that when he phoned the Minneapolis Police Department and reported what had been found in defendant Mithun's vehicle, the department told him that a special federal agent would be arriving to talk with him. Agent Patrick Hourihan arrived alone at the Marriott City Center and found Tony Jones in his office. Jones was not aware of all of the details about the earlier searches of which he was not a part, but did relay to Agent Hourihan as much as Matt Kielas had imparted to Jones. He showed Hourihan a sketch of the item contained in the white metal case, and Agent Hourihan told Jones he was not able to identify the item for certain by the sketch. Jones testified that he turned the entire matter over to Agent Hourihan because as far as Jones was concerned, Agent Hourihan was in charge.

Finally, the government call ATF Agent Patrick Hourihan who testified that his general responsibilities include the enforcement of federal firearms, explosive and some limited narcotics laws. Agent Hourihan has worked with ATF for about three years, prior to this he was an investigator for an insurance company and prior to that he was a police officer with St. Louis County, Missouri for about eight years. Agent Hourihan had not known Tony Jones at any time previous to the present incident.

Agent Hourihan recalls that at approximately 4:00 p.m. on December 6, 1989, Minneapolis Police Officer Globa contacted Hourihan "on the air" and asked him to proceed over to the Marriott Hotel and contact the security supervisor regarding a possible machine gun in the hotel.

Agent Hourihan explained that he is attached to the Minneapolis Narcotics Unit and has regular contact with them. Upon arriving at the Marriott City Center, Agent Hourihan met with Tony Jones in the security office, indentified himself, explained why he was there, asked what had happened and why Jones had called the police. Agent Hourihan recalls that Jones told him that a valet had looked in a vehicle and had seen what he thought to be a silencer and that Jones had shown Hourihan a sketch of the item discovered. Hourihan stated that he was not really sure who had drawn the sketch, but assumed that it was drawn from memory based on what the valet had described. Agent Hourihan and Jones discussed the location of the so-called silencer and the owner of the vehicle in which the silencer was contained. Agent Hourihan testified that he wanted to take a look at the vehicle to see if it was registered to the same person who was checked into the hotel, and asked Jones if they could walk over and see if the car was still in the garage. Hourihan emphasized that he did not plan to enter the vehicle but he did plan to look through the windows in order to gain any further information, as well as to record registration information off the vehicle. Hourihan testified that he gave no instructions to anybody about going inside the car.

Hourihan stated that although Matt Kielas joined him and Jones on their walk to the car, Hourihan did not at that time understand that Matt Kielas had been inside the car. As far as Hourihan understood, it was a valet who had been inside the car. Agent Hourihan stated that the garage was dimly lit, and when they arrived at the vehicle, he walked around the car once or twice looking at it from differenct angles to see what he could see. He recalls that the car was very dirty and dusty, and that he really could not see very much inside the vehicle. Hourihan went to the back and jotted down the license plate number, walked up to the front of the car to make sure the plates matched, attempted to read the VIN number off the dash and recalls that at this point, Tony Jones was with him.

Hourihan remembers talking with Jones about the security at the garage, whether there were other people that could go in and out freely and that sort of thing, and then hearing the valet call from the back of the car "yes, it's still here" or something of that nature. Hourihan remembers turning around and seeing that Kielas had the hatch open in the back and that he and Tony Jones proceeded to the back of the car. Agent Hourihan stated that by the time he and Jones arrived at the back of the car, Kielas had basically opened the case and had picked out the item from the case. Hourihan testified that he had not commented at all to Kielas about going into the car nor was he even aware that Kielas had the keys to the car on his person. Agent Hourihan identified the item that he saw in the case retrieved by Matt Kielas as the item depicted in the photo marked as Government Exhibit 3. Hourihan testified that he did not look inside the car in any way, that he told Kielas to close the case up and put it back where he had found it and lock the car up because Hourihan knew that any further search would require a search warrant. Hourihan stated that he did not want to risk the possibility of destroying any evidence. He is not aware that anyone entered the car after this point.

Back at the hotel, Agent Hourihan began his investigation of the owner of the car. He determined that the person checked into the hotel under the name of Todd Mithun was the same person to whom the car was registered. Hourihan also ran a check on Todd Mithun's arrest history, and discovered that Todd Mithun was a convicted federal felon currently on parole for distribution of cocaine. In addition, because the vehicle came back bearing a Minnetonka address, Agent Hourihan contacted the Minnetonka Police Department to see what sort of information about Mithun the department could provide. A Minnetonka police detective familiar with Mithun informed Agent Hourihan that Mithun was a convicted felon currently on federal parole, that Mithun had several prior arrests involving alcohol-related driving offenses and child neglect and that the police department had

received several disturbance calls from the Mithun house over the past years. The detective also informed Agent Hourihan that about two weeks prior to December 6th, an incident had occurred which the detective was still investigating, where a taxi driver had picked up Mithun at that address and had driven him to a location in North Minneapolis. Enroute, Mithun asked if the driver knew anything about firearms and proceeded to open up a small white case and display to the driver what the driver described as a machine gun. The driver also reported that there was a large quantity of high denomination U.S. currency contained in the small white case and that Mithun had told the taxicab driver that the gun was an "M something or a Mac something" as best as the driver could recall. Agent Hourihan testified that later on the night of December 6, 1989, he telephoned the taxicab driver and received the same story.

Agent Hourihan also checked the desk registration to confirm that Todd Mithun was staying at the Marriott Hotel and learned that Mithun had been adamant that the desk clerk know and make note of the fact that Mithun was also known as "Kenny." This information corroborated a statement by the taxicab driver that Mithun sometimes called himself "Kenny" for some reason. Agent Hourihan testified that he instituted surveillance at the hotel, and the following morning, December 7, 1989, observed Mithun leaving the hotel. Hourihan identified this person as the defendant in this case. Hourihan recalls that when Mithun left the hotel on December 7, 1989, he was wearing a long, full-length trench-type, black leather coat and western-style wide brimmed leather hat. Hourihan observed Mithun depart the hotel and walk toward his 1986 Celebrity station wagon which was waiting out in front of the hotel. Mithun climbed into the driver's seat and headed west on Seventh Street. Defendant Mithun was eventually stopped by Minneapolis patrol officers at the intersection of Glenwood and Lyndale Avenue on the near north side of Minneapolis.

Agent Hourihan testified that the primary purpose of

the stop was to identify the driver of the station wagon and insure that the man was in fact Todd Mithun, the convicted felon. Hourihan stated that at that point he understood that he had probable cause to believe that Mithun, a convicted felon, was in the vehicle in the possession of a firearm of some type. Hourihan arrived at the scene of the stop and watched as Mithun was removed from the car. Hourihan learned that Mithun had identified himself as Todd Mithun to the officers who proceeded to run a computer check on Todd Mithun. They learned that Mithun had a prior felony conviction and that his driver's license and license plates had been revoked. The officers decided at that point to arrest Todd Mithun for driving while revoked, and to tow his vehicle. The officer were preparing to conduct an inventory search of the vehicle which is the standard procedure any time they tow a vehicle, but Agent Hourihan discussed the matter with them and persuaded them not to search the vehicle at that time. Hourihan advised them that he possessed other information and had reason to believe there was probably a firearm in the vehicle and would prefer not risking destruction of evidence and ruining the investigation. Hourihan also informed the officers that he planned to apply for a federal search warrant and asked that they simply secure the vehicle. Thereafter, no one entered Todd Mithun's car as far as Agent Hourihan is aware, and the car was towed to the Minneapolis Police Department Impount Lot and placed inside in a secure area to which only one officer has a key.

Agent Hourihan went to the U.S. Attorney's office in Minneapolis, consulted with Lonnie Bryant and Joseph Walbran and relayed the entire sequence of events to them. Agent Hourihan told the Assistant U.S. Attorneys about Matt Kielas' entrance into Todd Mithun's car in Hourihan presence. The affidavit in support of the application for the search warrant was prepared as a joint effort amongst the three men and the final effort, along with the search warrant itself, was offered and received into evidence as Government Exhibit 1. Hourihan testified

that at the time the affidavit was prepared, he was under the impression that Jason Lehtinen was the person who accompanied him and Tony Jones to the car, when in fact it was Matt Kielas. Hence, the affidavit refers to Matt Kielas as Jason Lehtinen as well as to Jason Lehtinen's search prior to Hourihan's arrival. *See* Government Exhibit 3, Hourihan Affidavit, at 2, paragraph 3. Agent Hourihan testified that it was the decision of the Assistant U.S. Attorneys not to include in the affidavit the fact that Matt Kielas entered the vehicle while Hourihan was at the front of the car. Magistrate Cudd reviewed the application and issued the search warrant and it was pursuant to this warrant that Hourihan returned to defendant Mithun's car at the Minneapolis Impound Lot and searched the entire vehicle. During the search, Hourihan found the carrying case in the back cargo compartment of the station wagon behind the back seat, and noted that it was partially hidden from view and had some duffel bags and things piled on top of it. He believes that a person could have seen a corner of the case poking out from underneath the pile of bags and things on top of it. Hourihan clarified that the item found inside the case is actually a suppressor quality barrel extension. Also during the course of the search, Agent Hourihan found a weapon located in the right coast pocket of the long black leather coat that Todd Mithun had been wearing when he left the hotel. The coat was draped across the console of the car. In addition, Hourihan found one magazine partially protruding from underneath the front passenger seat, and a second magazine in the center console itself, both magazines were loaded.

Under cross-examination, Agent Hourihan stated that while it is illegal for a convicted felon to possess a silencer, he is not certain whether is is illegal for a convicted felon to possess a barrel extender or a flash suppressor. Hourihan believed at the time that neither the drawing that had been prepared of the item contained in the white metal case in defendant Mithun's car nor even Hourihan's own viewing of the item in the case was basis enough to

apply for a search warrant, because he was still unsure as to just where the firearm was. Hourihan suspected that there was a good possibility that the firearm itself was either with the defendant Mithun or somewhere in the vehicle, and rather than risk conducting a search of the car and coming up empty, Hourihan testified that he opted to choose the surveillance route in order to gather additional probable cause.

Regarding the trip that Agent Hourihan made to the parking garage with Matt Kielas and Tony Jones, Hourihan admitted that he did not give any instructions to either Kielas or Jones not to open the car. Hourihan also admitted that when Matt Kielas reached into the open case and picked up the suppressor and handed it to Hourihan, Hourihan did take it in his hand.

Agent Hourihan testified that he contacted the Fourth Precinct of the Minneapolis Police Department, Sergeant Diaz, to request assistance in stopping defendant Mithun's car as it left the Marriott City Center Hotel on December 7, 1989. At the time he did so, Hourihan was aware that defendant Mithun was a convicted felon on federal parole and that his driver's license and license plates had been revoked. He requested that the Minneapolis Police Department stop defendant Mithun's car and verify that it was indeed Todd Mithun the convicted felon driving the car, and if so, to arrest him. Agent Hourihan stated that there were two reasons for requesting the stop of Mithun's car: 1) to identify the driver, and since Hourihan is not a police officer and drives an unmarked car, he did not wish to involve himself and Mithun in a wild car chase through the City of Minneapolis so he deferred to uniformed police officers to make the stop; and 2) to obtain custody of Mithun's car. Hourihan knew that he could do so via the arrest of Mithun, as such is the procedure of the Minneapolis Police Department. Once Mithun's vehicle was impounded, Agent Hourihan agreed that he would be able to get his search warrant.

On questioning by the Court, Agent Hourihan stated that he did not know the whereabouts of the weapon when

Mithun left the hotel, and agreed that even if he had obtained a search warrant for Mithun's now-empty room, he would not have known where the weapon was. Hourihan stated that his reasons for establishing surveillance and waiting until Mithun went to his car prior to applying for the search warrant was that Hourihan did not want to ruin his chances of locating the actual gun. Hourihan stated, based on his experience, that he suspected the gun connected to the case and the flash suppressor was with defendant Mithun.

Both parties submitted post-hearing briefs on the suppression issue.

Defendant Mithun presents two major arguments as grounds for suppression of all evidence seized in this case. First, Defendant asserts tha that the warrantless search of his car undertaken by government agent Hourihan and two private individuals constituted an unreasonable search of his effects, thereby violating his constitutional right to be free from unreasonable searches. Accordingly, defendant argues that all fruits of that illegal search must be suppressed by this Court. Defendant concedes that purely private searches are not subject to the restrictions of the Fourth Amendment protection against unreasonable searches, but notes that if that private party is acting as an instrument or agent of the government in conducting the search, there is a Fourth Amendment transgression, citing *United States v. Bennett,* 709 F.2d 803, 805 (2d Cir. 1983). Defendant also concedes that it is the movant's burden to establish, by a preponderance of the evidence, that the private party acted as a government instrument or agent, citing *United States v. Feffer,* 831 F.2d 734, 739 (7th Cir. 1987). Defendant Mithun asserts that he has met his burden.

Defendant relies on *United States v. Walther,* 652 F.2d 788 (9th Cir. 1981) as well as on *Feffer,* to support his argument that Matt Kielas' removal of the gun case from defendant's station wagon in the presence of Agent Hourihan classifies Kielas as an agent or instrument of the government, and as such, Fourth Amendments

protections and prohibitions attach. Defendant contends that Kielas' entire purpose of removing the gun case from defendant's car was to assist Agent Hourihan. Defendant cites a quote from the *Walther* court which is quite apropos under the circumstances.

> This court has recognized that there exists a "gray area" between the extremes of overt governmental participation in a search and the complete absence of such participation. The resolution of cases falling within the "gray area" can best be resolved on a case by case basis with the consistent application of certain general principles. While a certain degree of governmental participation is necessary before a private citizen is transformed into an agent of the state, deminimus or incidental contacts between the citizen and law enforcement agents prior to or during the course of the search or seizure will not subject the search to Fourth Amendment scrutiny. The government must be involved either directly as a participant or indirectly as an encourager of the private citizen's actions before we deem the citizen to be an instrument of the state. The requisite degree of governmental participation involves some degree of knowledge and acquiescence in the search.

United States v. Walther, 652 F.2d at 791-792 (citations omitted).

Defendant asserts that in the present case, Agent Hourihan acquiesced in and was actually involved in Kielas' removal of the white carrying case from the back of defendant's station wagon. Defendant argues that because Agent Hourihan did not discourage Kielas from unlocking the car and removing the white carrying case and showing the contents of the case, that Hourihan therefore acquisced in this activity, thus subjecting the activity to the scrutiny of the Fourth Amendment. Defendant goes so far as to term Kielas' activities as a warrantless search in the presence of Agent Hourihan and asserts that Hourihan actually assisted in this

warrantless search thereby making it a governmental search subject to the restrictions of the Fourth Amendment, thus requiring suppression of all fruits of this illegal "search."

The government's response to defendant's arguments on this issue relies heavily on *United States v. Jacobsen,* 466 U.S. 109 (1984),[1] noting that the first three entries into, and subsequent searches of, defendant's car were conducted by Jason Lehtinen, John Thompson, Matt Kielas and Tony Jones without police knowledge or presence thus clearly placing them under the purview of private searches and beyond the reach of the Fourth Amendment. The government points out that the *Jacobsen* court held that the opening of a federal express package by federal express employees constituted private action, and stated:

> Whether those invasions were accidental or deliberate, and whether they were reasonable or unreasonable, they did not violate the Fourth Amendment because of their private character.

Id. at 115. The government contends that the holding in *Jacobsen* regarding private searches is even more appropriate in the present case where the owner of the car that was searched provided a key, thus extending an implied consent to enter the car.

This Court agrees that the first three entries and searches conducted by Lehtinen, Thompson, Kielas and Jones constituted private actions and because of their private character did not violate the Fourth Amendment. *Jacobsen,* 466 U.S. at 115. The testimony reveals that these four men were acting out of concern for their own safety, for the safety of other valets as well as for the safety of the hotel guests. Both Lehtinen and Kielas testified that it is a general practice of the valet staff at the Marriott Center City Hotel to enter the cars, park and move them, in addition to protecting the contents of the cars and checking for any hazardous condition or item.

The government contends that the fourth entry of

defendant's car while it was parked in the security garage associated with the Marriott City Center Hotel, should not be characterized as police action. As the government points out, Kielas, Jones and Agent Hourihan all testified that Hourihan did not direct Kielas to open the car. According to Agent Hourihan, the purpose of the trip to defendant's car was to identify the automobile, gain whatever information he could from the outside of the car and determine if anything could be observed through the windows. Neither Agent Hourihan or Tony Jones knew that Kielas had brought the keys to defendant's car, and from the testimony it appears that Kielas acted on his own volition when he unlocked the hatch of the station wagon and proceeded to remove the same white metal case previously handled three times by the valets.

It is noted that even though Tony Jones testified that Agent Hourihan did not orchestrate anything during the time of Kielas' entry into defendant's car, Jones seemed to believe that the purpose of their excursion to the car was to show Hourihan what had been found in the rear portion of the station wagon. However, Agent Hourihan testified that this was not *his* intention at all. In fact, Hourihan testified that he was not even aware that Matt Kielas had been inside defendant's car earlier that day. Hourihan testified that at that point he was confused about names of the different valets and it is clear to this Court that Hourihan did not at that time, know the entire story surrounding the entries into defendant's car. Hourihan testified that he did not plan to enter the vehicle, that all he wanted to do was

> take a look at the vehicle to see if this vehicle was registered to the same person who was checked into the hotel. Basically, I asked if we could walk over and see if the vehicle was still there and to verify it was still there. . . .I hoped to possibly see something else in the vehicle through the windows that might give me further information as to what was going on or possibly get registration information off the vehicle, that sort of thing.

Tr. 65.

While Agent Hourihan was viewing the dirty gray station wagon inside a dimly lit garage, writing down license plate numbers and checking the VIN number on the dash and discussing with Tony Jones access to and security in the garage, Matt Kielas proceeded to open the back hatch of the station wagon. Hourihan testified that he turned around, saw that the hatch was open and proceeded to the back of the vehicle where Kielas had the case lying open on the back end of the car. Kielas picked up the metal object contained in the case and said something like "it's still here." Hourihan admits that he did take the object in his hand when Kielas offered it to him. Tr. 83. Hourihan also stated that he did not tell Kielas to the car door or shut the case prior to viewing its contents. Hourihan did instruct Kielas to close the case, put it back where he had found it, and lock the car *after* Hourihan had seen the object.

The government asserts that even if Kielas' actions can be attributed to Agent Hourihan because of Hourihan's failure to explicitly counsel Kielas against entering the car, testimony about the fourth entry into defendant's car still should not be suppressed. The government argues that this is the exact issue that the *Jacobsen* court dealt with, asserting that there would be no Fourth Amendment issue if the persons involved in the three prior private searches had turned the white metal case and its contents over to the police rather than returning it to its spot in defendant's car. The government argues that the re-examination of the case which had been discovered and opened in three prior private searches should not affect the admissibility of the parties' observations nor of the items themselves just because the re-examination was performed in Agent Hourihan's presence.

Jacobsen involved a Federal Express package damaged and torn by a fork lift at the Minneapolis-St. Paul airport Federal Express office. The office supervisor requested the office manager to look at the package which the two then opened in order to examine its contents pursuant to

company insurance claims policy. From the outside, the package was an ordinary cardboard box wrapped in brown paper containing five or six pieces of newspaper which covered a ten inch tube made of duct tape. The supervisor and office manager opened the tube and found four zip lock plastic bags house within one another. The inner plastic bag held about six and one-half ounces of white powder, prompting the two to notify the Drug Enforcement Administration (DEA). The supervisor and office manager re-packed the package before the DEA agent arrived. The first DEA agent found the re-wrapped package with a hole in the side and the top open, and noticed that one end of the tube inside the box had been cut open. The agent removed the four plactic bags from inside the tube and observed the white powder. The agent then opened each of the bags and removed a trace of the powder with a knife blade and subsequently performed a field test on the spot, indentifying the white powder as cocaine. The *Jacobsen* court noted that:

> The fact that agents of the private carrier independently opened the package and made an examination that might have been impermissible for a government agent cannot render otherwise reasonable official conduct unreasonable. The reasonableness of an official invasion of the citizen's privacy must be appraised on the basis of the facts as they existed at the the time that invasion occurred.
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> * * *
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> The additional invasions of respondent's privacy by the government agent must be tested by the degree to which they exceeded the scope of the private search. *Walter v. United States,* 447 U.S. 649 (1980).

United States v. Jacobsen, 466 U.S. at 114-115.

Noting that even if the white powder itself was not in plain view to the DEA agent because it was wrapped in containers and covered with papers, the *Jacobsen* court stated:

> There was a virtual certainty that nothing else of significance was in the package and that a manual inspection of the tube and its contents would not tell him anything more than he already had been told.

Id. at 119. Finding it important that the package remained unsealed and that Federal Express employees had just examined the package and had invited the DEA agent to the office for the "express purpose of viewing its contents," the respondents could have no privacy interest in the contents of the package. *Id.*

> The agent's viewing of what a private party had freely made available for his inspection did not violate the Fourth Amendment.
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> * * *
>
> Similarly, the removal of the plastic bags from the tube and the agent's visual inspection of their contents enabled the agent to learn nothing that had not previously been learned during the private search. It infringed no legitimate expectation of privacy and hence was not a "search" within the meaning of the Fourth Amendment.
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> * * *
>
> The fact that, prior to the field test, respondents' privacy interest in the contents of the package had been largely compromised is highly relevant to the reasonableness of the agents' conduct in this respect. The agents had already learned a great deal about the contents of the package from the Federal Express employees, all of which was consistent with what they could see. The package itself, which had previously been opened, remained unsealed, and the Federal Express employees had invited the agents to examine its contents. Under these circumstances, the package could not longer support any expectation of privacy.

Id. at 119-121, (citations omitted).

The government asserts that in the present case the previous private inspections of the white metal case performed by Lehtinen, Thompson, Kielas and Jones compromised any privacy interest defendant Mithun had in the case, so that re-examination of the contents of the case by Agent Hourihan did not violate the Fourth Amendment. The government also cites *United States v. Walsh,* 791 F.2d 811 (10th Cir. 1986) in support of its argument that a warrant is not required when the police or government agents duplicate an earlier private search. *Walsh* involved a briefcase containing pistols, clips and several suppressors which ended up in the lost luggage department of Western Airlines in Salt Lake City, Utah. Airlines employees opened the briefcase with standard keys, observed the contents and summoned airport security. In the meantime an airport employee examined the suppressors and noted that some lacked serial numbers, a fact he reported to the BATF (Bureau of Alcohol, Tobacco & Firearms) agent who arrived later. The employee and his supervisor guided the BATF agent to the office where the briefcase was and showed the agent the briefcase's contents. The owner of the briefcase challenged the warrantless search and subsequent seizure of the briefcase by the BATF agent as violative of his Fourth Amendment rights, and requested that the evidence be suppressed. Citing *United States v. Jacobsen, supra,* the *Walsh* court held that the actions of the Western Airlines employees "were private actions, not directed, controlled or initiated by government agents. Therefore, the initial private activity of the carrier employees involved no interests protected by the Fouth Amendment." *United States v. Walsh,* 791 F.2d at 814, (citations omitted). Finding that the items inside the briefcase were in plain view once the airline employees re-opened the briefcase, and that as such, they could no longer support a reasonable expectation of privacy, the *Walsh* court held that the agent's examination of the briefcase merely repeated what the private search had already uncovered, and thus did not come within the

protections of the Fourth Amendment. *Walsh*, 791 F.2d at 816. In addition, the *Walsh* court found that it was of

> no significance that the briefcase was closed when the BATF agent arrived and then re-opened for him by a carrier employee. The happenstance of whether a government agent, let along a carrier employee not in concert with the government, re-opens that which has been searched privately does not convert "an otherwise private search into an unreasonable official search." *United States v. Blanton*, 479 F.2d 327, 328 (5th Cir. 1973).

United States v. Walsh, 791, F.2d at 816.

In the present case, it is clear to this Court that Agent Hourihan did not direct Matt Kielas to unlock the car and removed the white metal case containing the flash suppressor that had been previously discovered during the private searches. However, as the government concedes, it is arguable that by his silence and his failure to instruct Kielas to immediately close the hatch, that Hourihan acquiesced to re-examination of the case and its contents. Consequently, the undersigned will analyze this issue in the light most favorable to defendant Mithun, that being that Agent Hourihan did acquiesce to Kielas' presentation of the white metal case and its contents. Even so, the scope of Agent Hourihan's viewing of the white metal case and the suppressor by no means exceeded the scope of the three previous private searches. In fact, it was much less intrusive than the original Lehtinen/ Thompson search of defendant's entire vehicle. Thus, under the holdings of *Jacobsen* and *Walsh*, defendant Mithun's privacy interest were not compromised by Agent Hourihan, as these interests had already been compromised by the previous private searches in that the replication of the three private searches did not allow Hourihan to learn anything more than what had been previously learned during the private searches. Consequently, this viewing was not a "search" within the meaning of the Fourth Amendment.

Defendant next challenges the search warrant obtained on December 8, 1989, by Agent Hourihan to search defendant Mithun's vehicle, claiming the warrant was tainted by information obtained by Hourihan's prior "illegal search" at the Marriott parking ramp. Thus, argues defendant, all fruits seized pursuant to that warrant must be suppressed. Defendant contends that this issue is controlled by *Murray v. United States*, 487 U.S. 533 (1988). However, *Murray* involved facts quite distinguishable from those of the present case. There, Federal agents set up surveillance of a warehouse based on information received from an informant. The agents observed a truck and a camper driving into the warehouse and coming back out within 20 minutes. Sometime later on, the original drivers of the camper and truck turned the vehicles over to other drivers who were followed and ultimately arrested. Both vehicles contained marijuana. Subsequently, several agents returned to the warehouse and forced entry, observing in plain view numerous burlap-wrapped bales later found to contain marijuana. The agents left the warehouse without disturbing the bales, but kept the warehouse under surveillance. They re-entered the warehouse only after obtaining a search warrant. In their application for the search warrant, the agents did not mention the fact that they had entered the warehouse, nor did they rely on any of their observations made during that intial entry pursuant to the warrant, the agents re-entered the warehouse and seized 270 bales of marijuana as well as a notebook listing customers. In pre-trial motions, the defendants moved to suppress the evidence discovered in the warehouse, arguing that the search warrant was invalid because the agents did not inform the magistrate about their prior warrantless entry, and that the warrant was therefore tainted by that entry. The district court denied defendants' motion, the First Circuit Court of Appeals affirmed the district court's denial, and *certiorari* was granted by the United States Supreme Court.

The *Murray* court's discussion centers around the

independent source doctrine, quoting *Nix v. Williams*, 467 U.S. 431, 443 (1984):

> The interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a *worse* position than they would have been in if no police error or misconduct had occurred .... When the challenged evidence has an independent source; exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation.

Murray, 108 S.Ct. at 2533. Applying the independent source doctrine to the case before it, the *Murray* court noted that the agents surely acquired knowledge that the marijuana was in the warehouse at the time of their unlawful entry, but knowledge of the marijuana was also acquired at the time of entry pursuant to the warrant, and "if that later acquisition was not the result of the earlier entry there is not reason why the independent source doctrine should not apply." *Id.* at 2535. The *Murray* court continued, noting that:

> The ultimate question, therefore, is whether the search pursuant to warrant was prompted by what they had seen during the initial entry, or if information obtained during that entry was presented to the magistrate and affected his decision to issue the warrant.

Id. at 2535-2536. Further clarification was added by the court when it stated:

> To determine whether the warrant was independent of the illegal entry, one must ask whether it would have been sought even if what actually happened had not occurred—not whether it would have been sought if something else had happened. That is to say, what counts is whether the actual illegal search had any effect in producing the warrant, not whether

> some hypothetical illegal search would have aborted the warrant. Only that much is needed to assure that what comes before the court is not the product of illegality; to go further than that would be to expand our existing exclusionary rule.

Id. at n. 3.

Because the district court did not explicitly find that the agents would have sought a warrant if they had not earlier entered the warehouse, the Supreme Court found that an independent source was not established. Hence, the court vacated the judgment and remanded the case with instructions that the district court determine whether the warrant-authorized search of the warehouse was an independent source of the challenged evidence in accordance with the court's opinion. *Id.* at 2536

Defendant Mithun correctly asserts that in the present case, as in *Murray,* the search warrant affidavit made no mention of the fourth entry into defendant Mithun's car during which Agent Hourihan was shown the white metal case containing the flash suppressor. Defendant contends that the point is not whether the magistrate was told of the this entry, but whether this entry somehow prompted Hourihan to seek the warrant. In addition, defendant asserts that Agent Hourihan had no independant source for seeking this warrant, but that Hourihan's decision to seek the warrant was based on the "illegal search" of defendant's car.

The government argues that at best, *Murray* offers counsel only on the admissibility of the white metal case and the flash suppressor and does not call into question the admissibility of the other items seized from defendant's car pursuant to the search warrant. The government contends that *Murray* supports the government's position that the evidence should not be suppressed, asserting that there is no indication that Agent Hourihan deliberately intended to subvert the Fourth Amendment warrant requirement when he made the trip to view the grey Celebrity station wagon. Hourihan testified that his

purpose for wanting to see the car was to verify that that car was still in the parking garage, and if so, to obtain registration information, license plate number and to gather any other information that he could see through the car windows that would further enlighten him about the situation. As has been discussed previously, Hourihan did not direct Kielas to open the car, and in fact Hourihan was not even aware that Kielas had the keys to the car. It is clear that Kielas acted on his own volition. Furthermore, as discussed previously, Hourihan did observe the contents of the carrying case that Kielas presented to him, but the observation went no further than that. Hourihan directed Kielas to close the case, return it to its place and lock the car, knowing that any further search would require a search warrant, stating "I didn't want to go into the vehicle any further and risk destroying any evidence we found later." Tr. 68. Hourihan's observations of the case and the suppressor contained therein, duplicated three prior private searches and as such, no privacy interests remained in the white metal case and the re-examination by Agent Hourihan is not subject to the Fourth Amendment protections and restrictions. *See* discussion on *Jacobsen, supra.* Second, the government points out that the entry of the vehicle in the present case is very different from that of the entry into the warehouse by the agents in *Murray.* This is a major distinction between the instant case and *Murray* because the entry of the warehouse in *Murray* was clearly illegal in that the agents there broke into the warehouse and observed the bales. Here, the Kielas/Jones/Hourihan entry into Mithun's vehicle was not an illegal entry and was not an entry that required a warrant. It is notable that defendant's car was at all times in the custody and care of the Marriott valets, who possessed the keys to the car.

Finally, argues the government, the prior private searches as well as the Minnetonka taxi driver's report to the Minnetonka police, clearly provide an independent basis for the warrant application, a basis not present in *Murray.* In fact, there are several additional factors that

could easily provide a man of Agent Hourihan's experience an independent basis on which to apply for a search warrant. These factors, contained in Agent Hourihan's Affidavit in Support of Search Warrant, include the report Hourihan received from security chief Tony Jones that a hotel valet had viewed the contents of a piece of luggage belonging to a guest at the hotel which contained an item resembling a silencer. Government Exhibit 1, Hourihan's Affidavit at 2. Hourihan also learned that this particular guest appeared paranoid and nervous upon checking into the hotel and that "he had grabbed an employee named Brian and yelled at Brian that he was moving too slowly." *Id.* In addition, Hourihan learned that a valet had seen the guest remove a package from his vehicle and place it into the taxi, and that the guest became excited over the valet seeing the exchange and told the valet to turn around and not watch or pay attention to anything he was doing, and that the guest left in the taxicab. *Id.* Hourihan then learned that the name of this particular guest was Todd Mithun. *Id.* Hourihan affirmed that he checked the registration for the late model gray Celebrity station wagon parked in the security garage leased by the Marriott City Center and found it to be registered to Todd Mithun of 5901 Cedar Lake Road. *Id.* at 2-3. In addition, Hourihan states that when Special Agent Tom Doyle (ATF) interviewed Jason Lehtinen on December 7, 1989 Doyle learned that Lehtinen had been asked by a short man who accompanied Todd Mithun into the hotel at 5:00 a.m. to deliver a Twin City map and parking violation ticket to Mithun's room, Room No. 3004 in the Marriott Hotel. Lehtinen complied. Lehtinen also described to Doyle the item he viewed in the carrying case he discovered in Mithun's car as being approximately 12 inches long, cylindrical and metal. *Id.* at 4. Hourihan stated that while speaking with Tony Jones on December 6, 1989, he was presented a small drawing of

> what Jason Lehtinen had described seeing. The drawing showed a cylindrical shape with ventilation

> slots and holes often found on barrel extension and flash suppressors. "Based upon my training and experience, such objects are often attached to certain types of firearms, often high capacity firearms such as machine guns and para-military type weapons.

Id. at 5. Furthermore, Hourihan's affidavit contains information provided to him by Special Agent Cynthia Beebe who observed Todd Mithun and a women seated at a table in the lounge and guest area on the 30th floor of the Marriott City Center Hotel at approximately 2:00 p.m. on December 7, 1989. This floor is a secure floor and only guests with keys can access that floor via the elevators. *Id.* In addition, Hourihan was informed by Special Agent Doyle that when Doyle interviewed Marriott employee Brian Wright at approximately 3:00 p.m. on December 7, 1989, Doyle learned that Wright had found a cartridge on a table in the lounge and guest area of the 30th floor. Wright had subsequently turned the cartridge over to his supervisor Patti Jillek who then gave the cartridge to Agent Doyle. This cartridge was a .380 caliber jacketed cartridge which is used in handguns and some types of sub-machines guns stated Agent Hourihan. *Id.* Hourihan stated: "Based upon my training and experience, Mac-type firearms will fire only 9 millimeter, .38 caliber and .45 caliber ammunition." *Id.* at 7. Furthermore, Agent Hourihan included information gained by Agent Doyle, that a Todd Mithun had been previously convicted of a felony cocaine charge, sentenced to imprisonment for a year and a day and that he was currently released on special parole. *Id.* at 6. Also included in Hourihan's Affidavit is his conversation with Detective Mark Raquet of the Minnetonka Police Department in regard to Todd Mithun who was known to frequent 5233 Black Friar's Lane in Minnetonka. It was during this conversation that Hourihan learned of the report received by the Minnetonka Police Department from a taxi driver named Donald Kodlowski, about his encounter with a "Todd" who had discussed with Kodlowski and revealed to him a gun

Kodlowski stated looked like a machine gun contained in a small case along with a large amount of high denomination U.S. currency. *Id.* at 6-7. When Hourihan spoke to Mr. Kodlowski, Kodlowski provided a physical description of "Todd" as a man approximately 6 feet tall, medium build with a slightly paunchy build, reddish brown hair and a short reddish brown beard. Agent Hourihan stated: "I observed Todd Mithun on December 6 and December 7, 1989 and generally fits the description provided to me by Donald Kodlowski," *Id.* at 6. Kodlowski proceeded to corroborate the information regarding Todd Mithun which Hourihan had already received from Detective Raquet of the Minnetonka Police Department.

Agent Doyle, via a telephone interview on December 7, 1989, with Andrew Tillotson, a Marriott employee learned that Tillotson had observed the gray Celebrity station wagon near the entrance to the Marriott Hotel and had seen in the rear area of the station wagon a folding stock which Tillotson believed would fit a Mac-10 type firearm. Tillotson had previously seen Mac-10 firearms and explained to Doyle that the stock resembled one owned by a friend. Tillotson told Doyle that the remainder of the weapon was covered with a blanket, concealing it from view. *Id.* at 7.

Based upon all of the information that Agent Hourihan had gathered from the moment he entered the Marriott City Center and security chief Tony Jones' office on December 6, 1989, through December 7, 1989, when Hourihan and two Assistant United States Attorneys drafted the application for the search warrant, it is reasonable to assume that Agent Pat Hourihan, a veteran law enforcement officer, would have sought a warrant to search defendant Mithun's car notwithstanding his viewing of the flash compressor contained in the white metal case. Regardless, since Hourihan's re-examination of the evidence already discovered in three previous private searches was not violative of the Fourth Amendment, this Court finds that the search warrant was not tainted by Hourihan's re-examination of the white

metal case and the suppressor contained therein. Furthermore, the two Assistant U.S. Attorneys working with Agent Hourihan to draft the Affidavit in Support of Application for the Search Warrant were excessively cautious in insuring that the search warrant would not be founded on "tainted" information, and omitterd all reference to Hourihan's re-examination of the flash suppressor already discovered during the three previous searches. Under the *Jacobsen* ruling, Hourihan and the Assistant U.S. Attorneys could have included the re-examination by Hourihan in the affidavit and still the warrant would not be tainted, as this entry by Kielas to show Hourihan the evidence was not in violation of the Fourth Amendment. The government asserts, and this Court agrees, that the revelation to Magistrate Cudd of the Kielas/Jones/Hourihan's entry into defendant's car would merely have added further confirmation of the existence of gun-related contraband. This information was not critical to the finding of probable cause, for probable cause abounds in Hourihan's Affidavit. The omission was not in reckless disregard of the truth, and does not warrant the "extreme remedy of suppression." *United States v. Reivich,* 793 F.2d 757, 762 (1986).

The application for the search warrant was based on all of the information heretofore discussed, as well as information obtained subsequent to the December 7, 1989, stop of defendant Mithun's vehicle by the Minneapolis Police Department. Defendant Mithun was arrested for driving with a revoked license and his car was impounded. Agent Hourihan specifically directed that the Minneapolis police officers not search the impounded car even though such is the policy of the Minneapolis Police Department, as Hourihan wished to obtain a federal search warrant. In his Affidavit, Hourihan states:

> I saw the gray Chevrolet Celebrity station wagon, Minnesota license plate number 896DVR and in plain view saw luggage, duffel bags, a gray case, wooden ammunition box and miscellaneous loose

clothing in the vehicle. The cases, luggage and bags were of a size and type that could hold firearms, handguns, flame suppressors, permits, receipts and other documents necessary to possess such items and ammunition used in firearms.

Government Exhibit 1, Affidavit of Agent Pat Hourihan at 8.

Probable cause to issue a search warrant exists when an affidavit sets forth sufficient facts to justify a prudent person in belief that contraband will be found in a particular place. *Illinois v. Gates*, 462 U.S. 213, 238 (1983), *reh'g denied; see Brinegar v. United States*, 338 U.S. 160 175 (1949). A determination whether probable casue has been established involves a "practical, commonsense" evaluation of the "totality of the circumstances." *Gates* 462 U.S. at 238. The role of the district court is not to make a *de novo* determination of probable cause; rather, the decision to issue the warrant is to be upheld if supported by substantial evidence in the record. *Massachusetts v. Upton,* 466 U.S. 727, 728 (1984) (*per curiam*). A prior determination of probable cause is to be accorded great deference. *Gates* 462 U.S. at 230; *United States v. Ellison*, 793 F.2d 942, 946 (8th Cir.), *cert. denied,* 479 U.S. 937 (1986). *See also Spinelli v. United States,* 393 U.S. 410, 419 (1960); *United States v. Christenson,* 549 F.2d 53 (8th Cir. 1977). Since only the affidavit was presented to the issuing magistrate at the time of the application for the warrant, "only that information which is found within the four corners of the affidavit may be considered in determining the existence of probable cause." *U.S. v. Leichtling,* 684 F.2d 553, 555 (8th Cir. 1982).

In examining the affidavit this Court must determine whether the totality of the circumstances contained therein justified issuance of the warrant. Here, Agent Hourihan's Affidavit set forth sufficient facts to justify the belief that contraband would be found in defendant Mithun's station wagon, and that the totality of the circumstances justified issuance of the warrant. As such, United States Magistrate

J. Earl Cudd did not err in approving the warrant to request to search defendant Mithun's car.

Based on the foregoing discussion, defendant's motion for suppression should be denied.

In addition to the oral arguments, counsel for both parties submitted a summary of conferences between counsel for the parties. This summary contains the following agreements:

1. The government agrees to disclose all Jencks material three days prior to trial.
2. The government agrees to make pre-trial disclosure of any Rule 404(b) evidence it intends to offer at trial.
3. The government represents the defendant made no statements it intends to introduce at trial.
4. The government intends to offer at trial evidence obtained from search and seizure.
5. The government does not intend to introduce any identification evidence at trial.
6. The government will direct the agents to preserve any rough notes they have and will disclose them to the defense.
7. The government agrees to provide any *Brady* material.
8. The government agrees to provide defense counsel with a copy of discovery in advance of the motions hearing.

This summary is dated March 14, 1990, and is signed by Andrew W. Birrell, attorney for defendant Mithun.

At the hearing, Mr. Peterson, counsel for the government, represented to the Court that he and Mr. Birrell continue to be in agreement in regard to the summary statement. Mr. Peterson clarified that although the government presented no photo spreads to any witness or any other similar indentification procedures, it may well be that the government will have witnesses at trial who will identify the defendant. Defendant's counsel represented that he understood this to be the case. In addition, counsel for the government noted that as far as

introduction at trial of statements made by the defendant, defendant Mithun did make statements to a Minnetonka police officer late in January, 1990, concerning another incident. Counsel for the government stated it may be that that statement will be used by the government for impeachment purposes in Mr. Birrell's case or perhaps for rebuttal. Counsel for the government represented that he would not be using that statement in his case-in-chief, and Mr. Birrell indicated his agreement in this regard. Tr. 4.

Based on the foregoing, and all the files, records and proceedings herein,

IT IS HEREBY RECOMMENDED that defendant's motion for suppression of evidence obtained as a result of search and seizure be DENIED.

DATED: April 21, 1990.

BERNARD B. BECKER
United States Magistrate

Pursuant to Local Rule 16C(2), any party may object to this report and recommendation by filing with the Clerk of Court and serving all parties, within ten days, a writing which specifically identifies those portions of this report to which objection is made and the legal and factual basis for that objection. All memrora (sic) and other documents to be submitted in support of this report must be filed within seven days of the making of any objection. Failure to comply with this provision shall opete (sic) as a forfeiture of the objecting party's right to seek review in the Court of Appeals.

Unless the parties are prepared to stipulate that the District Court is not required by 28 U.S.C. §636 to review a transcript of the hearing in order to resolve all objections made to this report and recommendation, the party making th (sic) objections shall timely order, and cause to be filed within ten days, a complete transcript of the hearing.